No. 02-855 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, et al., *Petitioners*

v.

JESUS AVILA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari.[1] His claims of ineffective assistance are compelling. Respondent has spent 12 years in prison for a crime committed by another man. The Ninth Circuit in a unanimous decision held that Jesus Avila's trial attorney provided ineffective assistance of counsel because he failed to investigate and introduce evidence that would have raised a reasonable doubt as to Jesus's guilt. That holding is squarely in accord with Supreme Court and court of appeals precedent and creates no conflict among the circuits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 297 F.3d 911 and is reprinted at page 3 of the Appendix to the Petition for Writ of Certiorari. The order denying Petitioners' petition for rehearing en banc is reproduced in the Appendix at p. 2. The decisions of the United States District Court for the Central District of California are reprinted at pages 28, 29 and 39 of the Appendix.

STATEMENT OF THE CASE

On August 19, 1990, Jesus Avila and 30 to 40 of his friends and acquaintances attended a baby shower in Ham Park in Lynwood, California. Respondent and a number of his male friends were members of a primarily Hispanic gang called the Young Crowd gang. During the shower a number of young black men, some of whom belonged to other gangs, entered the park. This group included Romel Johnson, Darryl Ferguson, Teavious Whatley, Travon Towner and Demetrius Kidd. Respondent and his friends

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[1] This brief will also refer to Respondent as "Jesus Avila" or "Jesus."

approached the newcomers and asked what gang they were from. After talking to these other men for a while and showing off his tattoos, Respondent left to rejoin his friends at the shower. As he was walking away, Jesus saw two of the black males walking across the park with a can of spray paint.

While preparing his food, Respondent saw his friends heading towards the group of black males near the wall in the park. Respondent walked over to the area carrying food and beer to see what was going on. When he arrived, the black males were spray painting the wall. A fight broke out between Respondent's friends and the black males. Realizing that his girlfriend would be upset that he was involved in a fight, Respondent started walking away from the area of the fight to the Walnut Street entrance to the park where his girlfriend Joanna Espinosa and her friend Elizabeth Luis were standing. He asked the women where they were going when he heard gunshots. Respondent pulled the young women down to the ground. When the shots stopped and he got up, Respondent saw a number of his friends run out of the park through the Walnut Street entrance. Respondent did not realize that anyone had been shot and saw no reason to run.

Respondent and a few others remaining in the park began to gather up the presents and food when the police pulled up to the Walnut Street entrance. The police jumped out of their cars, displayed their guns and told everyone to freeze. Respondent was asked if he had been drinking to which he responded, "Yes." The police told him he would be spending the night in jail because he was under the influence. The police did not find Respondent or his friends in possession of a gun. The police officers also testified that at the time they arrived at the park, Respondent and Jose Nieves were the only male Young Crowd gang members left in the park. Deputy Allen even testified that

in most cases, gang members who are involved in a confrontation disperse after shots are fired.

Respondent was handcuffed, put in the police car, along with his friend Jose Nieves, and taken to the area where Demetrius Kidd, the shooting victim, had fallen down. Romel Johnson and Demetrius Kidd identified Respondent as the shooter at the in-field identification.[2] Despite his identification of Respondent as the shooter, Kidd testified at Jesus Avila's trial that he was sure the shooter was wearing black pants. On the day of the shower, Respondent was wearing light blue khakis, a white shirt and black house slippers. This was confirmed by pictures taken at the party and the pants that were put into evidence at Respondent's trial. The gunshot residue test taken of Respondent's hands at the time he was detained did not show evidence of gunpowder.

After his arrest, attorney George Denny initially represented Respondent. Mr. Denny knew Respondent and Respondent's brother Ernesto because he represented both of them, as well as others, in connection with a federal civil action against the Los Angeles Sheriff's Department. As was revealed at Respondent's state court evidentiary hearing in 1993, about one week after the shooting, Respondent's brother Ernesto approached Mr. Denny and his investigator and asked them to please help Respondent. During this conversation, Ernesto admitted that he, not Respondent, was the shooter.[3] In light of this conflict of interest, new counsel, Ted Yamamoto, was appointed.

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[2] Contrary to Petitioner's assertion, Johnson and Kidd did not independently identify Respondent as the shooter at in-field show ups. *Petition* at 3. Deputy Gary Allen testified that he and the other officers did not conduct separate in-field show ups for Johnson and Kidd. He further testified that neither of the men was admonished in any manner prior to the show up identifications.

[3] Petitioner implies that Ernesto waited for over two years before admitting he was the shooter. (*Petition* at 3.) This simply is not true. The testimony presented at the

Before Respondent's trial Yamamoto became convinced that Ernesto Avila, not Respondent, was the shooter. Despite this belief, he conducted no investigation with respect to a defense of third-party culpability and did not instruct his investigator to do so either. Yamamoto testified at the state evidentiary hearing that he assumed Respondent's mother would not want him to implicate Ernesto in the shooting. Yamamoto also said he continued to hope that Ernesto would come into the courtroom sometime during the trial to confess to the crime. *See Appendix* at 10-11.

There were 30 to 40 potential witnesses to the shooting in Ham Park. However, trial counsel failed to interview almost all of the individuals in the park on the day of the shooting. In fact, he did not personally interview a single witness before the trial began. Further, his investigator, despite billing 100 hours of pre-trial investigative time, interviewed only those witnesses who happened to be in the area of Ham Park when he went to view the scene. Counsel and his investigator did not interview Respondent's brother Ernesto, did not interview any of the police officers who testified at trial, and did not even attempt to interview a single one of the black males (including the victim) who entered Ham Park on the day of the shooting. Trial counsel failed to subpoena a single witness to Respondent's trial.

At trial the prosecution presented an almost open and shut case against Jesus Avila. Both Romel Johnson and Demetrius Kidd (the victim) identified Jesus as the shooter. The remaining prosecution witnesses, primarily sheriff's deputies who came on the scene after the shooting, fell in line. Little or no attempt was made by trial counsel to point out the weaknesses in their testimony. Furthermore, trial counsel attempted to

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evidentiary hearing established conclusively that Ernesto confessed to George Denny and his investigator shortly after the shooting. (*Appendix* at 12.)

present an alibi defense only through three fairly weak witnesses, none of whom was in a position to even view the actual shooting. One of these three "alibi" witnesses (Blanca Montoya) even perjured herself by testifying that Ernesto Avila (Respondent's brother) had not been in the park on the day of the shooting. Had trial counsel examined photographs taken at the baby shower on the day of the shooting, he would have seen that Ernesto was in fact in the park that day.

Trial counsel completely failed to present a third party culpability defense through the testimony of *four eyewitnesses* who saw Ernesto fire the shots at Demetrius Kidd or through Ernesto himself. In fact, he even failed to interview Ernesto before trial to see if he would be willing to testify. Yamamoto also failed to present the testimony of several credible alibi witnesses who were in a position to see where Respondent was at the time of the shooting. Trial counsel also failed to discover evidence to impeach the testimony of the prosecution witnesses, including the investigating officer. He failed to discover and present evidence concerning the gang affiliations of the Black males. Trial counsel also failed to investigate and discover much evidence that would have impeached the testimony of Romel Johnson and Demetrius Kidd – key prosecution witnesses. In addition, trial counsel failed to address the suggestiveness of the in-field identification procedures employed by the sheriff's department.[4] *See Appendix* at 12.

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[4] The identification of Respondent by the victim was fraught with inconsistencies. According to Kidd and Johnson's friend, Travon Towner, both Kidd and Johnson were running in front of him at the time of the shooting and neither of them looked back as the shots were being fired. Towner also testified at the evidentiary hearing that Kidd did not identify the shooter either shortly after the shooting or while in the hospital. Trial counsel did not interview Towner or subpoena him for trial. Towner's testimony would have caused the jury to seriously question the testimony of the only two witnesses who identified Respondent as the shooter. Further, the in-field identification of Jesus Avila as the shooter was tainted by the suggestive identification procedures employed by the

At Respondent's state evidentiary hearing, ordered by the California Court of Appeal, a very different picture of the events that took place in Ham Park was painted. At the outset, Ernesto Avila testified that he was the person who shot Demetrius Kidd on August 19, 1990 in Ham Park.[5] Ernesto further testified that he told this to Respondent's pre-trial counsel and his investigator shortly after the shooting. Further, Ernesto waived the attorney-client privilege thereby allowing George Denny to testify that Ernesto had confessed the crime to him within several days of the shooting. Additionally, four eyewitnesses testified that Ernesto Avila fired the shots in Ham Park on August 19, 1990. They included Terri Clark, Alice Dominguez, Marcella Riboni and Angela Espinoza. Five percipient witnesses also testified at the evidentiary hearing that Jesus was near them at the time the shots were fired, that he was in a different area of the park from where the shooting occurred and that he was not the shooter. These witnesses included Jose Padilla, Joanna Espinoza, Ramona Juarez, Ramon Vasquez and Rosa Luis.[6] Substantial evidence was also presented to impeach the testimony of prosecution witnesses and to rebut prosecution evidence. *See Appendix* at 12.

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sheriff's department. For example, only two men were arrested and taken to the location of the victims. Of these two, only Respondent was removed from the car and the officers failed to conduct separate in-field show-ups for each of the victims (Kidd and Johnson). Further, neither victim was admonished in any way prior to the identification. Kidd testified at the evidentiary hearing that he heard the police broadcasts as he was lying on the stretcher so assumed that the police were bringing over the actual shooter. He said that rather than identifying the shooter, he was identifying the person with the tattoos whom he had seen and spoken to earlier. Kidd also testified that he did not get a good look at the shooter and was not certain Respondent was the person who shot him.

[5] It should be noted that the statute of limitations for attempted murder had not run at the time Ernesto testified. He was not given any kind of immunity or promised leniency in exchange for his testimony.

[6] As they testified at the evidentiary hearing, all these witnesses were willing to testify at Respondent's trial, but none were asked to do so by trial counsel. In fact, with the exception of Terri Clark, none were even contacted or interviewed before trial.

Despite the mountain of evidence presented at the state evidentiary hearing, the referee dismissed all the witnesses who identified Ernesto Avila as the shooter as lacking credibility.[7] He also found that the witnesses were not available to the defense at the time of trial due to their lack of cooperation, despite their testimony that they would have testified had they been asked. He further dismissed all the additional alibi witnesses as providing cumulative evidence. *Appendix* at 125-126.

SUMMARY OF THE ARGUMENT

The Petitioner's writ of habeas corpus in this case was granted for alternative reasons. First, the Ninth Circuit held that the state court decision was "contrary to" federal law under 28 U.S.C. § 2254(d)(1). In the alternative, the Ninth Circuit granted the petition under 28 U.S.C. § 2254(d)(2) because the state court adjudication of Jesus Avila's claims "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Appendix* C at 14-15. In analyzing Respondent Jesus Avila's claims the court of appeals looked to the last reasoned decision of the state court which was the report of the referee from the state evidentiary hearing in 1993.

Notably, the Ninth Circuit did not even reach three other claims of ineffective assistance of counsel raised by Avila in his petition for writ of habeas corpus, as it concluded that trial counsel was ineffective for failing to investigate and present evidence at trial that Jesus Avila's brother, Ernesto, was the shooter. *Appendix* C at 13, n. 5.

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[7] This finding is in direct conflict with statements made by the Referee on the record during the evidentiary hearing. Twice he said that Alice Dominguez, an independent witness who identified Ernesto as the shooter, was a credible witness.

ARGUMENT

A. The court of appeals properly found that the state court's decision was based on an objectively unreasonable determination of the facts in light of the evidence and its holding is in accord with Supreme Court and court of appeals precedent.

In analyzing Respondent's claims of ineffective assistance of counsel, the court of appeals strictly applied the language of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and granted Respondent's petition because it found that the last reasoned decision of the state court was both "contrary to" federal law and, in the alternative, was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (*Appendix* at 14-15, citing 28 U.S.C. § 2254 (d)(1) and § 2254(d)(2).) In reviewing Respondent's claims under *Strickland v. Washington*, 466 U.S 668 (1984), the court of appeals found that trial counsel was incompetent and Respondent was prejudiced thereby.

Petitioner misstates the facts in asserting that the court of appeals applied a standard of review not sanctioned by the AEDPA. The Ninth Circuit did not, as Petitioner alleges, apply a "firm conviction" standard of review. Rather, the court of appeal's reference to the term "firm conviction" was limited to its analysis of Respondent's claims under § 2254(d)(2). The Ninth Circuit held that it could grant the habeas petition under § 2254(d)(2) only if it found that the state court referee's findings were "'clearly erroneous' such that we are left with a 'firm conviction' that the determination made by the state court was wrong and that the one [Jesus] urges was correct." (*Appendix* at 15, citing *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000.) The citation to *Van Tran* and its use of the "firm conviction" standard was not a

lessening of the standard of review, as Petitioner suggests, but rather an attempt to explain how deferential a standard of review is required under the AEDPA.

In *Van Tran*, the Ninth Circuit noted that the Supreme Court, in *Williams v. Taylor*, 529 U.S. 362 (2000), did not specifically define the term "unreasonable" in the context of § 2254(d)(1) cases involving "unreasonable applications" of federal law, but had provided some guidelines to help the courts in applying the concept. The *Van Tran* court then went on to further clarify the proper application of the term and standard of review in cases involving an "unreasonable application" of federal law under 28 U.S.C. § 2254(d)(1).[8] In looking for guidance in determining what constitutes an "unreasonable application" of federal law the Ninth Circuit looked to the doctrine of "clear error" as a "source for the most helpful body of precedent." *Van Tran*, 212 F.3d at 1152.

While noting the limitations of the "clear error" cases, the Ninth Circuit observed that "[T]he clear error doctrine . . . most nearly reflects the *kind of respect* for other courts' judgments that Congress and the Court felt was appropriate here." *Id.* at 1153, emphasis added. The Ninth Circuit believed that the "clear error" standard most closely resembled the objective standard of "unreasonableness" sanctioned by the Supreme Court in *Williams v. Taylor*, 529 U.S. at 409-411. The Ninth Circuit went on to explain that "clear error" generally allows for reversal "only where the court of appeals is left with a 'definite and firm conviction' that an error has been committed." It held that under the

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[8] While the court of appeals' use of the "firm conviction" language in this case was primarily in reference to the analysis of Respondent's claims under § 2254(d)(2), rather than under § 2254(d)(1) as in *Van Tran*, both subsections of § 2254 contain the term "unreasonable" in their text. It would seem that the standard by which reasonableness is to be judged would be the same under subsection (d)(1) and (d)(2) inasmuch as the legislature chose to use the same term in both. Petitioner apparently agrees. *Petition* at 10.

AEDPA it would reverse a state court's decision as involving an "unreasonable application" of clearly established federal law, "when our independent review of the legal question does not merely allow us ultimately to conclude that the Petitioner has the better of two reasonable legal arguments, but rather leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous – in other words that clear error occurred." (*Id.* at 1153-1154.)[9] See *Appendix* C at 15 wherein the court of appeals in this case cites *Van Tran* at 1153-1154 and its lengthy discussion of what constitutes an "unreasonable application of federal law."

Petitioner's concern that the Ninth Circuit has "eviscerated" the inquiry into the reasonableness of the state court's factual determinations and will allow relief solely upon a determination that the state court was wrong is unfounded. *Petition* at 11. As *Van Tran* held, "Although we believe that the ruling was erroneous, it was not 'contrary to' clearly established federal law; more important, the error did not involve an unreasonable application of federal law. Put differently, there was error, but not clear error." *Van Tran v. Lindsey*, 212 F.3d at 1157. Likewise in a recent case involving ineffective assistance of counsel, the Ninth Circuit held that its conclusion that the state court erred in its application of federal law, "does not suffice to afford Delgado federal habeas relief. We must also determine whether the state court's decision was *objectively unreasonable*." *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000), citing *Williams v. Taylor*, 529 U.S. at 409-410, emphasis added. "Absent clear error, the deference we owe

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[9] It is worth noting that in *Van Tran* the Ninth Circuit denied habeas relief holding that the state court erred but that the error was not "contrary to" and did not involve an "unreasonable application" of federal law. *Van Tran*, 212 F.3d at 1155.

state court decisions dictates a denial of habeas relief, even when we conclude that a legal error has been committed." *Delgado*, 223 F.3d at 981.[10]

Throughout its opinion, the Ninth Circuit weaves in the inquiry both as to the reasonableness of trial counsel's representation (under *Strickland*) and the reasonableness of the state court referee's findings thereon. *Appendix* at 15-26. There can be no doubt that the court of appeals properly found an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Ninth Circuit in this case granted the petition for writ of habeas corpus because it found that the state court erred in its application of federal law and that that error was objectively unreasonable.

B. The Ninth Circuit granted strict deference to the state court's factual findings and found that Respondent Jesus Avila had rebutted the presumption of correctness with clear and convincing evidence under 28 U.S.C. Section 2254(e)(1).

Contrary to the Petitioner's assertions, the federal circuit courts are not in disarray with respect to the standard of review applicable to cases under § 2254(d)(2) and § 2254(e)(1).[11] In particular, the Ninth Circuit seems to quite clearly understand the interplay between both sections of the AEDPA. Section 2254(d)(2) which allows for the granting of a petition for writ of habeas corpus when a state court decision "was based on an unreasonable determination of the *facts* in light of *the evidence* presented,"

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[10] The *Delgado v. Lewis* opinion was authored by Judge Pregerson of the Ninth Circuit, just as was the opinion in Respondent Avila's case.

[11] In this regard, Petitioner quotes a footnote in a Ninth Circuit opinion wherein the court said, "As an analytical matter, the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear." *Petition* at 11. Petitioner, however, omits the rest of the footnote which reads, "Both appear to address state court factual findings. We need not define the precise relationship, however, as the standard of review appears to be clear error under both statutory provisions." *Green v. White*, 232 F.3d 671, 672, n. 3, citations omitted. It appears that no petition for writ of certiorari was filed by Petitioner in the *Green* case.

presupposes that state court factual findings will be reviewed by federal courts in certain cases. (Emphasis added.) Section 2254(e)(1) states clearly that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the applicant has the "burden of rebutting the presumption of correctness by clear and convincing evidence."

Rather than skirting the reasonableness inquiry, the court here used the "firm conviction" quote from the *Van Tran* case to explain that simple error was not enough to entitle one to federal habeas relief. Rather, the error had to be of a magnitude that the court of appeals was left with a "firm conviction" that the factual findings were "clearly erroneous" and that "the determination made by the state court was wrong and that the one [Jesus] urges was correct." *Appendix* at 15.[12] Petitioner observes that it is generally acknowledged that the AEDPA requires increased deference to state court factual findings. *Petition* at 11. It then cites several cases from various circuits to demonstrate this fact. However, Petitioner then goes on to cite cases, *all from circuits other than the Ninth*, wherein it argues the federal courts appear ready to interpret §§ 2254(d)(2) and 2254(e)(1) pursuant to "pre-AEDPA standards such as those found in former §§ 2254(d)(6) and (d)(8)." The references that follow are to cases out of the Second, Fifth and Eighth Circuit Courts of Appeals – not the Ninth Circuit! *Appendix* C at 12. Thus, it appears that Petitioner's concern is not over the Ninth Circuit's interpretation of

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[12] In attempting to enlighten litigants as to the "height of the hurdle" they must clear in showing that a fact found by a trial court was "clearly erroneous," the Ninth Circuit in *Fisher v. Roe* quoted a decision out of the Seventh Circuit: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Fisher v. Roe*, 263 F.3d 906, 912 (9th Cir. 2001), quoting *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

the AEDPA and the relevant standards of review, but over that of other circuits. This is not the appropriate case in which to question the rulings of federal courts of appeal other than the Ninth.

Petitioner cries for the federal courts to 'acknowledge' and 'effectuate' the heightened factual deference owed under the AEDPA. The Ninth Circuit in this case has done just that. Rather than apply an arguably lower standard such as setting aside state court factual findings if they are not "fairly supported by the record," the court of appeals here expressly acknowledged the deference owed state court factual findings.[13] "AEDPA requires us to presume that the referee's factual findings are correct." *Appendix* C at 20. The court of appeals then held that such factual findings could be rebutted only with "clear and convincing" evidence – the express language of § 2254(e)(1).[14]

The Petitioner legally misstates the record in asserting, "the Ninth Circuit employed a 'firm conviction' standard of review – a standard not found in the AEDPA but described as involving a determination that the state court was 'wrong' and Avila 'correct' – to reject the state court's factual and credibility determinations in favor of conclusions reached as the result of its independent review of the same state court record." (*Petition* at 7.) In conducting its analysis of Respondent Avila's claims under 28 U.S.C. § 2254(d)(1) and (d)(2), the court of appeals was explicitly mindful of the fact that under 28 U.S.C. §2254(e)(1) "a determination of a factual issue made by a state court

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[13] The deference accorded state court factual findings in this case can be contrasted with that afforded in another case decided under the pre-AEDPA standard. "We must defer to the state court's credibility finding unless the finding is not fairly supported by the record considered as a whole." *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997).

[14] It is worth noting that not only did the Ninth Circuit here accord due deference to that state court's findings of fact, it also understood that judicial scrutiny of trial counsel's performance under *Strickland v. Washington* must be "highly deferential." *Appendix* C at 15, citing *Strickland*, 466 U.S. at 689.

shall be presumed correct" and that the Petitioner (Avila) had the burden of rebutting this presumption of correctness with "clear and convincing evidence." *Appendix* C at 20. Not only did the court understand and apply the presumption of correctness and the "clear and convincing" evidence standard required to rebut that presumption, the court of appeals specifically cited to the standard *five times* in its opinion. (See *Appendix* C, at 16; 20; 21, n. 12; 22, n. 13; 23, n. 14.)

Petitioner cites examples of the Ninth Circuit's so-called "impermissible expansion" of its power to grant habeas relief. *Petition* at 7. The examples all relate to testimony presented at the state evidentiary hearing as to the identity of the actual shooter. Not only did four eyewitnesses see Ernesto Avila (not Jesus) fire the shots at Demetrius Kidd on August 19, 1990, Ernesto himself testified to this fact at the state evidentiary hearing in 1993.

With respect to the testimony of the eyewitnesses to the shooting, the Ninth Circuit specifically held that it found clear and convincing evidence in the record to demonstrate that Terri Clark was close to the fight, not further away in the barbecue area as the state court referee had noted in his report. The court of appeals concluded, "There is no basis in the record to conclude that Clark, standing 'close' to the fight, could not have identified Ernesto as the person running after and shooting at the black men." *Appendix* at 21-22, n. 13.[15]

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[15] Contrary to Petitioner's assertion, the state court referee did not find Terri Clark's testimony as lacking credibility based on her longstanding relationship with Jesus Avila. *Petition* at 7. What the referee said in his report was "Terri Clark, who grew up with Petitioner, testified that she saw Ernesto do the shooting." *Appendix* J at 126. At no point in his report did the referee use this relationship as justification for finding that Ms. Clark's testimony lacked credibility. It seems that the referee mentioned the connection between Respondent and Ms. Clark merely as a way of identifying one of the witnesses

The Ninth Circuit also rejected the referee's credibility findings with respect to the other three eyewitnesses because the record contained "clear and convincing evidence" that Alice Dominguez was credible and that photographs in evidence established that she could see the area where the victim fell from where she was located. The court of appeals further noted that Ms. Dominguez told her friend Rosa Luis immediately after the shooting that Ernesto was the shooter – a fact to which Ms. Luis testified at the state habeas hearing. *Appendix* at 22, n. 13. The Ninth Circuit also found that there was no basis in the record for the referee to conclude that Marcella Riboni and Angela Espinoza, two other eyewitnesses, lacked credibility because they were "600 feet" from the shooting. *Appendix* J at 126. Diagrams of the park that were in evidence were not drawn to scale and did not reflect the distance between the witnesses and other areas of the park. Further, the Ninth Circuit noted that it was undisputed that the shooter began running after the victims at around home plate, an area which was significantly closer to the barbecue area (where Ms. Riboni and Ms. Espinoza were located) than where the shooting actually occurred. The Ninth Circuit held there was no basis in the record for the referee to conclude that these two witnesses, standing on picnic benches, could not have identified Ernesto as the shooter. *Appendix* C at 22-23, n. 14. Contrary to Petitioner's assertion (*Petition* at 8), the Ninth Circuit did not simply substitute its findings concerning witness credibility for those of the state court referee. The Ninth Circuit examined the record in detail and determined that it contained concrete evidence establishing conclusively that the referee's findings were wrong.

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to the shooting. Further, it logically follows that if Terri Clark grew up with Jesus Avila, she also grew up with his brother Ernesto.

The Ninth Circuit also found "clear and convincing" evidence that trial counsel's lack of investigation, not witnesses' lack of cooperation, kept the evidence that Ernesto was the shooter out of the courtroom at Respondent's trial. *Appendix* at 16-17. The Ninth Circuit rejected the referee's finding that Ernesto was unavailable to testify at trial for several reasons. First, trial counsel never told his investigator that he believed Ernesto was the shooter and never instructed the investigator to seek out evidence implicating Ernesto. Trial counsel never even attempted to contact Ernesto to see if he would testify. *Appendix* C at 16-17. Second, Ernesto confessed shortly after the crime to Attorney George Denny and Mr. Denny's investigator, David Lynn. Third, when asked to do so by Respondent's appellate counsel, Ernesto testified at the state evidentiary hearing in 1993 that he was the shooter (long before any applicable statute of limitations had run and with no promise of immunity). Based on all of this evidence, the Ninth Circuit reasonably concluded, "There is every reason to believe that, had Yamamoto conducted an adequate investigation and confronted Ernesto with declarations from witnesses to the shooting, Ernesto would have, at the very least, made an inculpatory statement that Yamamoto could have used to cross-examine Ernesto at trial." *Appendix* C at 17 and 24. The findings of the state court referee to the contrary were patently unreasonable and were rebutted with clear and convincing evidence.

Further, Petitioner limits its discussion concerning the Ninth Circuit's finding of ineffective assistance to the eyewitnesses to the shooting and to the shooter Ernesto's testimony. A review of the opinion reveals that a trial investigation never really occurred. Trial counsel did virtually no investigation before trial, and relied on the testimony of a few weak alibi witnesses, rather than even attempting to pursue the

identity of the actual shooter. It is clear from the record of the state evidentiary hearing that the witnesses all existed and were available to testify at the time of trial, had trial counsel chosen to do even a cursory investigation. In addition to the testimony of Ernesto (the shooter) and the eyewitnesses to the shooting, Ernesto confessed to an attorney, George Denny, shortly after the shooting. Several other witnesses all testified that they were near Respondent at the time of the shooting and that Respondent was *not* the shooter. *Appendix* C at 15-25. "There is every indication that all eight of these witnesses would have testified at Jesus's trial . . . . . Their prior conduct reflects both a willingness to come forward and the consistency of their testimony." *Appendix* C at 23-24.

In asserting that the Ninth Circuit simply re-interpreted and re-evaluated "ambiguous or conflicting" evidence in arriving at the conclusion that trial counsel was incompetent and Respondent was prejudiced thereby, Petitioner makes no attempt to identify the so-called "ambiguous or conflicting" evidence. *Petition* at 9. Further, the Ninth Circuit did not merely assert that clear and convincing evidence existed to rebut the referee's credibility and factual findings. Rather, the court of appeals set forth the state court's findings and outlined the "clear and convincing" evidence in the record that rebutted those findings. *Appendix* C at 16; 20; 21, n. 12; 22, n. 13; 23, n. 14. In reviewing the record on appeal, the Ninth Circuit held, "We do not denigrate the role of the fact-finder in judging credibility when we review the record in hindsight. But as we set forth herein, our review of the record leaves us with a definite and firm conviction that error cognizable under *Strickland's* prejudice prong in fact occurred." *Appendix* C at 21.

C. The Ninth Circuit's holding is consistent with the holding in *Early v. Packer* because the state court's reasoning and result contradicted the governing law as set forth in *Strickland v. Washington*.

In *Early v. Packer* this Court clarified the proper analysis of a habeas petitioner's claims under the "contrary to" prong of 28 U.S.C. §2254(d)(1). *Early v. Packer*, 537 U.S. __, 123 S.Ct. 362, 365. In that case, this Court rejected the standard articulated by the Ninth Circuit in *Packer v. Hill*, 277 F.3d 1092 (9th Cir. 2002), that a state court decision is "contrary to " Supreme Court law merely because it fails to cite applicable Supreme Court precedent. In *Early v. Packer*, this Court found, in part, that although the state court had not cited or relied upon the relevant Supreme Court precedent, neither the court's reasoning nor its result were contrary to that precedent. 123 S.Ct. at 364-365. Thus, it held that the habeas petition should not have been granted.

This Court's clarification of the "contrary to" language in *Early v. Packer* does not dictate a result different from the one reached here. In Jesus Avila's case, the Ninth Circuit did note the state court's failure to cite any law, "much less controlling Supreme Court precedent," and its failure to apply either prong of the *Strickland* two-part test for evaluating ineffective assistance of counsel claims. However, the court of appeals further found that the state court's reasoning and its result contradicted governing Supreme Court law as set forth in *Strickland v. Washington*.[17]

In analyzing Respondent Avila's claims of ineffective assistance, the court of appeals explained that it could grant Jesus Avila's petition for writ of habeas corpus "*if* we find that Yamamoto's performance violated *Strickland*." *Appendix* C at 14-15,

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[17] Contrary to Petitioner's assertion, the Ninth Circuit did not find that the state court's findings were "automatically" contrary to federal law based on its failure to cite or apply federal law. (*Petition* at 5.)

emphasis added. As noted by this Court in *Early v. Packer*, this case properly falls under the "contrary to" provision of §2254(d)(1) because either the state court decision applied a rule that contradicted the governing law as set forth in Supreme Court cases or confronted a set of facts that were materially indistinguishable from a relevant Supreme Court precedent and yet it arrived at a result different from that precedent. *Early v. Packer*, 123 S.Ct. at 365 (2002), citing *Williams v. Taylor*, 529 U.S. at 405-406. Although the state court referee failed to mention *Strickland* specifically in his report, he did conclude that, "Trial counsel Ted Yamamoto provided effective and competent assistance at the time of petitioner's trial." *Appendix* at 130.

The Ninth Circuit here analyzed Respondent's ineffective assistance claims under both prongs of the *Strickland* test. In so doing, the court of appeals found that trial counsel's performance was deficient because he failed to investigate or introduce evidence at trial that Jesus's brother, Ernesto, was the actual shooter. In particular the Ninth Circuit noted that an attorney who fails to investigate and introduce evidence that establishes his client's "factual innocence," renders deficient performance. *Appendix* at 15-16, citing *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999), other citations omitted. In its detailed discussion of trial counsel's deficient performance, the Ninth Circuit held there was "clear and convincing evidence" that it was trial counsel's inadequate investigation, rather than witnesses' lack of cooperation (as the state court referee had found) that kept the exculpatory evidence from the jury. *Appendix* C at 16.

Because the California state courts never analyzed whether there was a "reasonable probability" that, but for trial counsel's error, the jury would have had a reasonable doubt as to Respondent's guilt, the Ninth Circuit conducted an independent

review of the record as to the second prong of the *Strickland* test. *Appendix* C at 20. After its review of the record, the Ninth Circuit held that it was left with a "definite and firm conviction" that error under *Strickland's* prejudice prong had occurred. *Appendix* C at 21-26. In so doing, the Ninth Circuit found that Respondent Avila had rebutted the state referee's findings of fact with "clear and convincing evidence." *Appendix* C at 21, n. 12; 22, n.13; 23, n. 14.

The court of appeals here did not hold that the state court referee's report was contrary to federal law simply because it did not cite or apply any law, much less federal law. *Petition* at 13. While the court of appeals did note this shortcoming on the part of the last reasoned state court decision, it conducted its own review of Respondent Avila's claims under the two-part *Strickland* test. It further used the referee's failure to address the second prong of the test as the basis for its independent review of the record as to the prejudice aspect of Respondent's claim. Had the Ninth Circuit *not* found that trial counsel's performance fell below an objective standard of reasonableness and that Respondent Avila was prejudiced thereby, the petition would *not* have been granted.

In *Packer*, the Ninth Circuit held that because the state court "*failed to apply* the controlling Federal law, . . . the result it reached need not be clearly erroneous in order for a writ to issue; the fact that the result is erroneous is sufficient so long as the *Brecht* standard is met." *Packer v. Hill*, 291 F.3d 569, 579, n. 12 (9th Cir. 2002). The Supreme Court held that the Ninth Circuit *Packer* court erred in then proceeding to a "simple error" inquiry rather than complying strictly with § 2254(d)(1) or § 2254(d)(2) which provide for habeas relief only if state court determinations are not merely erroneous, but are an "*unreasonable* application" of clearly established federal law or based on an

"*unreasonable* determination of the facts." *Early v. Packer*, 123 S.Ct. at 366, emphasis in original.

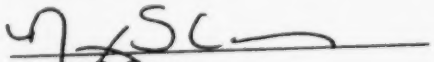
The Ninth Circuit in this case did not apply a simple error inquiry. Rather, it conducted an analysis of prejudice under *Strickland v. Washington*. *Appendix* C at 15, n. 7, citing *Jackson v. Calderon*, 211 F.3d 1148, 1154, n. 2 (9th Cir. 2000), cert. denied, 531 U.S. 1072 (2001). Under *Strickland*, a finding of ineffective assistance cannot be made unless the court also determines that a petitioner was prejudiced as a result of counsel's deficient performance. In other words, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 366 U.S. at 694. The Ninth Circuit in Respondent's case, "having considered the totality of the evidence introduced at trial and at the state habeas hearing" held that it was left with a "*definite and firm conviction* that error cognizable under *Strickland's* prejudice prong in fact occurred." *Appendix* C at 21 and 26, emphasis added. The "definite and firm conviction" language is taken from the "clear error" cases wherein simple error alone will not suffice to warrant habeas relief. See *Van Tran v. Lindsey*, 212 F.3d at 1157; *Delgado v. Lewis*, 223 F.3d at 981 and Section A, *supra*. Throughout its analysis of Respondent's claims of ineffective assistance, the court of appeals was clear that simple error would not suffice to grant Respondent habeas relief. Rather, it deferred to all state court factual findings and held Respondent to the burden of overcoming those findings with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

CONCLUSION

The court of appeals' opinion in this case creates no conflict among the circuits. Further, the holding does not conflict with the holding of this Court in *Early v. Packer* because the court of appeals in this case found the state court findings to be both "contrary to" federal law and an "unreasonable determination of the facts in light of the evidence." Further, Respondent Avila's case does not suffer from the flaws found by this Court in *Early v. Packer*. The state court's findings were both "contrary to" controlling Supreme Court law and an "unreasonable determination of the facts in light of the evidence" under §§ 2254 (d)(1) and (d)(2). If this Court should find error with respect to the court of appeals' holdings under one provision of the AEDPA, this should not affect the outcome as the Ninth Circuit found alternative grounds for relief here. The petition for writ of certiorari should be denied.

February 10, 2003

Respectfully submitted,



Nancy S. Cpan
Paulette Donsavage
Counsel for Respondent
Jesus Avila

DECLARATION OF SERVICE BY MAIL
IN THE SUPREME COURT OF THE UNITED STATES

Case Name: George Galaza, Warden, et al. v. Jesus Avila
Case No.: 02-855

I, Nancy S. Coan, declare:

I am over 18 years of age, and not a party to the within cause. My business and mailing address is 111 Pine Street, Suite 1300, San Francisco, CA. On February 10, 2003, I served a copy of the attached:

RESPONDENT'S BRIEF IN OPPOSITION AND MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

on the following, by facsimile first class U.S. Mail as follows:

Shawn McGahey Webb
Deputy Attorney General
300 S. Spring Street, Suite 5212
Los Angeles, CA 90013

I hereby certify that I am the Attorney of Record for Petitioner, Jesus Avila, in this matter.

Each envelope was sealed on February 10, 2003 and placed in the United States mail at Alameda, CA, the county in which my home office is located, with the postage thereon fully prepaid.

X I declare that the above referenced document was provided to the CLERK OF COURT by Federal Express.
X I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 10, 2003 at Alameda, California.

Nancy S. Coan, Declarant